

No. 2425.

— IN THE —

United States Circuit Court of Appeals for the Ninth Circuit

FARMERS AND MERCHANTS' BANK,
PHOENIX, as Intervenor,

Appellant,

vs.

ARIZONA MUTUAL SAVINGS AND
LOAN ASSOCIATION and ARIZONA
TRUST COMPANY and SIMS ELY,
as Receiver for the ARIZONA MU-
TUAL SAVINGS AND LOAN AS-
SOCIATION and ARIZONA TRUST
COMPANY, and the Intervening Peti-
tioners who were allowed to Intervene
in the Cause entitled CHARLES W.
CLARK, Complainant, vs. ARIZONA
MUTUAL SAVINGS AND LOAN
ASSOCIATION and ARIZONA
TRUST COMPANY, Defendants, in
the Court Below, by the Decree of
March 12, 1914,

Appellees.

**Brief of the Arizona Mutual Savings and Loan Association and Arizona
Trust Company and Sims Ely, as Receiver for the Arizona Mu-
tual Savings and Loan Association and Arizona Trust Company,
Appellees.**

Filed this.....day of....., 1914.

Clerk.

**GEORGE J. STONEMAN,
REESE M. LING,**

Solicitors for Arizona Mutual Savings and Loan Associa-
tion and Arizona Trust Company and Sims Ely, as Re-
ceiver for the Arizona Mutual Savings and Loan As-
sociation and Arizona Trust Company.

Phoenix Printing Company, Phoenix, Ariz.

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Brief of the Arizona Mutual Savings and Loan Association and Arizona Trust Company and Sims Ely, as Receiver for the Arizona Mutual Savings and Loan Association and Arizona Trust Company, Appellees.

In this proceedings appellant claims the right to intervene under a decree rendered in the District Court of Arizona of date February 27, 1913. It expressly disavows the right to

intervene under decree of March 12, 1914. Its right to intervene depends primarily upon the jurisdiction of the court to enter the decree of February 27, 1913. For the purpose of determining whether or not this appeal is well taken it seems absolutely necessary to first determine whether the decree of February 27, 1913, was within the jurisdiction of the court to enter, and this in turn depends upon the pleadings in the main suit of Charles W. Clark against defendants and appellees named above. From this point of view it is necessary to a correct understanding of the controversy involved in this appeal not only that there shall be made a statement of facts additional to the statement contained in the Brief of appellant, but that, without objecting to the sufficiency of the record presented by appellant upon the ground that it does not in itself contain a sufficient statement to enable the court to pass upon the controverted points, reference be made by appellees, by permission of this Court, to the pleadings contained in the Transcript of Record filed in cause No. 2417, being an application for a writ of mandamus directed to Honorable William H. Sawtelle, Judge of the United States District Court of Arizona. To this end and for these reasons we beg the indulgence of the Court in presenting the following additional

STATEMENT. .

[On July 15th, 1912, Charles W. Clark as complainant as a minority stockholder acting in a representative capacity filed a Bill of Complaint in behalf of the Arizona Mutual Savings

and Loan Association and its stockholders in which it is alleged: among other things, that the complainant is one of the many stockholders in said Loan Association who are the holders and owners of certificates of stock therein, and as such are entitled to all the rights, privileges and property of such stockholders, and that said rights, among others, include the right of complainant and all other stockholders similarly situated, to participate in all of the assets of the defendant Loan Association, and upon the dissolution thereof, to receive such, if any, of the property as may remain undistributed as the property of the defendant Loan Association after it had discharged all of its obligations; that the officers of said Association, knowing that the same was insolvent and unable to meet its obligations, and without the knowledge of complainant and many others similarly situated, entered upon a fraudulent and corrupt agreement with certain persons for the organization of the Arizona Trust Company for the purpose of taking over the assets and property of the Loan Association; that a pretended directors' meeting and stockholders' meeting, at which the Loan Association, in consideration of 1300 shares of the capital stock of the Trust Company, agreed to deliver to the Trust Company all of the said Loan Association's assets and property; that said Loan Association had no right to convey all or any of its assets to the said Trust Company, and that the said transfer was in fact a corrupt scheme; that the Loan Association was insolvent, that its officers knew this fact, and that they were trustees for the benefit of the complainant and the other stockholders sim-

ilarly situated, and that the assets were impressed and charged with a trust for the benefit of the stockholders; that there was a close and intimate relationship of trust and confidence existing between the officers of the defendant Trust Company and the officers of the Loan Association, and that it was their duty to safeguard and protect the interests of complainant and other stockholders; that these officers violated their duties of trust and confidence, and dealt with the property belonging to the Loan Association for their own private and selfish ends, and without the slightest benefit to either the Loan Association or its stockholders; that the transfer of the assets of the Loan Association to the Trust Company was fraudulent and void; that at the time, the Trust Company had no assets or property of any kind or character, and had none at the time it entered into the agreement with the Loan Association, and that the 1300 shares of stock of the Trust Company had no value of any kind or character, and that the assets of the Loan Association were intermingled with the assets of the Trust Company in a deliberate and premeditated attempt to secure the assets and property of the Loan Association at a sacrifice of the rights of its stockholders; that it was impossible to determine the rights and equities of complainant and the other stockholders of the Loan Association without a judicial accounting between both of the defendant Companies, and that the officers and directors be compelled to account for their official misconduct in the matters set forth, and for that reason complainant brings this bill in equity in his own behalf, and in behalf of all others similarly situated, to the end that

the transactions herein above set forth, made between the defendants above named, be annulled and declared void and held for naught, and to the end that an accounting may be had between the two defendants, and between the Loan Association and other stockholders similarly situated; that a receiver be appointed to take charge of and administer the assets of the Loan Association; that others similarly situated who may desire to intervene, be permitted to do so, and that they be awarded such relief as to a court of equity may seem proper.

The prayer of the bill was:

(1) That the transactions between the defendants be declared void;

(2) That a restitution of all the assets of the Loan Association by the Trust Company be decreed;

(3) That an accounting between the defendants be had;

(4) That an accounting between the Loan Association and the complainant and those other stockholders similarly situated be decreed;

(5) That a receiver for the Loan Association be appointed to reduce its assets to possession;

(6) That a Master be appointed to take evidence of the facts alleged in the bill, "and to determine the rights and equities of complainant and *all of the parties concerned herein.*"

(7) "That the affairs of the said defendant Loan Association be wound up, *its assets marshalled as aforesaid, and distributed to those found to be entitled thereto.*"

Thereafter several petitions in intervention were filed by intervenors represented by personal counsel, each petition of intervention adopting all of the averments of the original bill in equity filed by Clark. On February 27, 1913, a decree was entered by the judge then presiding in the District Court of Arizona setting aside for the benefit of the intervenors named in the several petitions and for their benefit exclusively, such portions of the assets as might be collected by the receiver appointed in the original cause, paying expenses of this personally conducted and private litigation out of the stockholders fund, decreeing that such assets as might remain in the hands of the receiver above an amount sufficient to pay off in full without depreciation from any cause whatsoever, the money paid by intervenors into the Loan Association. Thereafter and subsequent to the adjournment of the term during which the decree of February 27th, 1913, was pronounced, to-wit, on the 12th day of March, 1914, the decree of February 27th was modified by the then presiding judge of the United States District Court upon the grounds as expressed in said decree shown in Record page 92.

It is readily apparent from this statement that the right of appellant not only to intervene in the original action but to appeal from the original decree and order of March 12th, 1914,

Remain in the Trust

rests upon the jurisdiction of the Court, upon the pleadings and the issues involved in the Clark suit and answers filed thereto, to enter the decree of February 27th. For the reasons and upon the authority hereinafter set forth, we earnestly contend that the decree of February 27th was beyond the right, power, authority or jurisdiction of the Court and then presiding judge to enter. In support of which statement we respectfully direct the Court's attention to the following

ARGUMENT AND AUTHORITIES.

The main suit was originally instituted by Charles W. Clark as a minority stockholder of the Arizona Mutual Savings and Loan Association in behalf of himself and all other stockholders of that association similarly situated, to the end that the transactions set forth in his bill of complaint between the Arizona Mutual Savings and Loan Association and the Arizona Trust Company

“be annulled and declared void and held for naught and to the end that an accounting may be had between the two defendants above named and between the defendant Loan Association and your orator, and others similarly situated * * * that a Receiver be forthwith appointed to take possession of and to marshall the assets of defendant Loan Association * * * to determine the amounts due and owing from defendant Loan Association to your orator and other stockholders similarly situated * * * and for such other relief as to a Court of equity may seem

proper." Folios 105-107 inclusive. Transcript No. 2417. ;

That suit is admittedly a stockholders' suit, brought in equity only because of the impossibility of securing the assent of the directors of either company to the bringing of the suit, and is brought in a representative capacity, not as an individual, but in behalf of the corporation and of all stockholders in the corporation whose interests were jeopardized who were in any manner affected by the attempted consolidation of the Loan Association with the Trust Company; such consolidation it is alleged in the petition of Clark was void and beyond the

"right, power or authority of the defendant Loan Association or majority of the directors thereof" * * * "in violation of his rights as a stockholder in defendant Loan Association and in violation of the obligation which said defendant Loan Association owed to all stockholders similarly situated, and in violation of the contract which then and now exists between your orator and other stockholders similarly situated, and the said defendant Loan Association." Folios 82 and 83. Transcript No. 2417.

It is further alleged in the complaint of Clark that the attempted transfer was

"in reality a fraudulent scheme improperly to perpetuate the existence of the defendant Loan Association after it had in fact, as heretofore alleged, *become and was insolvent* and was in fact unable to perform and dis-

charge its duties and obligations to its stockholders by reason of defendant Loan Association's insolvency, and by reason of the fact that said defendant Loan Association had suspended the operation of its said business and had conveyed or attempted to convey among its other assets, its good will to the said defendant Arizona Trust Company and had in other respects *violated, broken and destroyed its contract* with your said orator above named *and other stockholders similarly situated.*" Folio 84. Transcript No. 2417.

The prayer of the Clark petition asks that the "transactions herein set forth as made between the defendants above named may be declared to be annulled and of no force and effect, and that a restitution of *all* of the assets of the Arizona Mutual Savings and Loan Association from the defendant Arizona Trust Company be adjudged and decreed, and that an accounting between both of the above named defendants be had and taken and an accounting between defendant Loan Association and your orator and other stockholders similarly situated be ordered and decreed." Folio 109. Transcript No. 2417.

"and that the affairs of Defendant Loan Association be wound up, its assets marshalled as aforesaid and distributed to those found to be entitled thereto." Folio 110. Transcript No. 2417.

We submit that the funds of the Loan Association constitute a trust fund in the hands of

those in control of its affairs for the benefit of those exclusively entitled thereto.

This is either a stockholder's suit, brought in a representative capacity for himself and all other stockholders similarly situated only because the corporation, for the reasons alleged in the petition is disqualified from suing, in which event and as would be the case if the suit had been in the name of the Corporation instead of a stockholder, the decree should have been in favor of the corporation and for the benefit of all of its stockholders, or

This is a suit brought by intervening stockholders, not in a representative capacity and not for the benefit of the corporation and stockholders, but for the redress of wrongs and the enforcement of rights not given to all stockholders; in this event and only in this event, plaintiff and intervenors in this action can be entitled to a decree for their personal benefit, in which other stockholders similarly situated did not share, or;

This is a creditors suit brought at the expense of and for the benefit of creditors, in which event such creditors as did not present their claims and share the expense of the litigation would not be entitled to the proceeds of the judgment.

If it is a stockholders' suit brought in a representative capacity, theoretically in the name of and actually for the benefit of the corporation, all stockholders whether assenting or non-assenting, whether guilty or innocent of participation in the acts of the corporate officers sought to be set aside and by the decree declared void, are bound by the decree for the suit is by the Corporation through its stockholders, not only

for all stockholders of the corporation but in effect is against the corporation itself, and it is apparent that a stockholder as a plaintiff cannot be held as bound by the terms of the decree and at the same time be precluded from sharing in the benefits.

Moreover the so-called final decree of February 27th, 1913, finds

“that at or about the time (meaning the time when the pretended transfer of assets was made by the Loan Association to the Trust Company) *the defendant Loan Association was insolvent* and unable to meet its obligations to its stockholders as said obligations were accruing.” Record page 5.

And further provides

“That each of said exchanging stockholders be and they hereby are *restored to their original position and status as stockholders of defendant Loan Association, and each of said exchanging stockholders is hereby deprived of his status as a stockholder in defendant Trust Company.*” Record p. 7.

We assert, in view of these findings, that a distribution of the assets collected by the Receiver cannot be made to any stockholder of the Arizona Mutual Savings and Loan Association upon any other basis than that the original complainant and intervening stockholders should pro rate in the assets so collected by the Receiver as their respective interests as stockholders may appear to have been “*in the insolvent Loan As-*

sociation at the time of the alleged attempted and void transfer," for upon what theory may the Receiver be directed to disregard these two findings in the decree and to pay to certain stockholders a fixed and definite sum without such ascertainment?

To permit any stockholder suing in a representative capacity for the corporation and its stockholders to be paid in full the book value of his stock as has been done in the decree of February 27th, 1913, would be to disregard the fact that they were stockholders in the *insolvent* Loan Association and take from the pocket of those for whose benefit this stockholders' suit was instituted a sum of money sufficient to pay in full those stockholders who were his representatives in the bringing of the suit. It is in effect and in fact the entry of a personal judgment in favor of a few stockholders who assume to act for all, and against those stockholders who, relying upon the declaration of the complainant that he was bringing the suit in their behalf, rested secure in the belief that their representative would treat them fairly and justly; this personal judgment so entered in favor of complainant and intervenors and against the other stockholders personally and individually was without process or notice save that given to the corporation of which they were members and for which the suit was commenced, and this notwithstanding the fact that the contribution from the remaining and unpreferred stockholders comes from them as stockholders in an insolvent corporation to pay in full other stockholders in such insolvent corporation.

This decree was not within the issues of the

allegations of the Clark bill of complaint which it must be remembered were adopted in their entirety by all of the petitioning intervenors, but was so clearly without the issues submitted that equity and good conscience made its modification imperative to the end that all stockholders for whom the original bill of complaint was filed should not only be bound by the judgment but should participate in its benefits; that no one or more stockholders of an insolvent corporation should be preferred over other stockholders in such corporation or over creditors of the Loan Association, and that the stockholders of the Loan Association should be, to use the phrasing of learned counsel for the petitioner, "restored to their original status as Loan Association stockholders." The allegation of insolvency in itself precludes the possibility of the intervenors obtaining preference under the decree, because of the fact that if the Mutual Company was insolvent defendant stockholders would have a right to a pro rata only in the assets remaining, whereas the decree, notwithstanding the allegation of insolvency, purports to prefer the intervenors to the extent of paying their subscriptions without depreciation caused by insolvency.

THIS IS NOT A SUIT BROUGHT BY A DEFRAUDED STOCKHOLDER TO SET ASIDE A SUBSCRIPTION OF STOCK IN THE TRUST COMPANY, EXCEPT IN SO FAR AS THE SUIT IS BROUGHT TO DECLARE THE TRANSACTIONS BETWEEN THE TWO COMPANIES VOID AND FRAUDULENT AND REINSTATE STOCKHOLDERS OF THE LOAN ASSOCIATION TO

THEIR ORIGINAL STATUS IN SUCH ASSOCIATION BEFORE THE VOID AND FRAUDULENT TRANSFER OF ITS ASSETS.

“It is a well established rule of law that a stockholders’ suit to remedy a wrong done to the corporation must be in behalf of all of the stockholdtrs since they are all equally interested in the results of the suit. Accordingly the complainant must bring the suit in behalf of himself and such other of the stockholders as may care to come in.”

Cook on Corporations, 6th Edition, pp. 734, page 2426.

“An injury done to the stock and capital by negligence or defeasance is not an injury to such separate interest, but to the whole body of stockholders.”

Brickerhoff v. Bostwick, 88 N. Y. 52, 105 N. Y. 567; 1 N. E. 667.

Richmond v. Irons, 30 L Ed. 870.

Craig v. Gregg, 83 Penna St. 19.

Deviney v. Hart Coal Co., W. Vir. 68 S. E. 789.

It is held to be

“a fatal defect in the plaintiff’s petition both original and amended that it seeks no recovery on behalf of the corporation but seeks a direct recovery of damages to the plaintiff, the statement not entitling him to such recovery.”

Evans v. Brandon, 53 Tex. 56;
 Howe v. Barney, 45 Fed. 668.

“Money or property recovered from directors or other persons in a suit in equity instituted by a stockholder on behalf of the stockholders, belongs to all of the stockholders and not the complaining stockholder; it goes to the corporation, the decree must be for the benefit of the corporation and not for the complaining stockholders.”

Wallace v. Lincoln Savings Bank, 89 Tenn. 630;

Landis v. Sea Isle, etc., 53 N. J. Eq. 654;

Loewenstein v. Diamond Match Co., 94 N. Y. App. 383;

Thompson on Corporations, 6th Ed., pages 4490-91, 4560;

Thompson vs. Stan, 20 N. Y. Sup. 317;

Thompson on Corporations, page 4566.

The relations one with the other of stockholders of a Loan Association are peculiar and differ from the relations of stockholders in other corporations, in that the interest of each stockholder in such Loan Association is mutual and the value of each share of stock depends upon the mutuality of the contract and upon the observance or non-observance of each other stockholder of his contract of subscription to stock in such an association. This value is influenced by the fact of whether or not, because of the failure to make stated payments any stockholders forfeit their interest in the association, and the amount of money which may have been paid before such

forfeiture comes to the Treasury of the company for the increasing of its capital under the head of "lapses." It depends also and varies because a borrowing stockholder may not only forfeit the amount which he has repaid on the sum borrowed, but the security as well, and by diminishing the number of those entitled to share in the assets and earnings, at the same time add to the value and amount of such assets.

"If as a result of the suit money is recovered for the benefit of the company it goes into the corporate treasury as any other funds of the company, and inures to the benefit of all shareholders, those assenting to the suit and those dissenting, those innocent and those guilty. Although this may seem to outrage ones sense of propriety, yet in no other way can legal principle be satisfying and in no other way can so near an approach to perfect justice be attained. In such a case, however, where the money is eventually to be distributed among the share holders the court may order immediate payment to the plaintiff of his share or proportion."

Machen 1185—Cases cited.

"A shareholders' suit is brought for a wrong to the corporation which but for exceptional circumstances would be the only proper plaintiff. The complaining share holder should sue as a representative of the aggregate right of the share holders; that is to say, on behalf of himself and all other share holders similarly situated, and hence a

bill filed on his own behalf alone would be dismissed.

Machen, pp. 1172—Cases cited.

“The bill may be maintained by one share holder on behalf of all the others, although some of the latter have acquiesced in the transactions complained of and would therefore be barred from appearing as plaintiffs themselves.”

Machen, pp. 1172.

“Defects in the process or in service constitute the most unquestionable ground for vacation of judgment after the lapse of the term. If there is an entire absence of service of process, and this fact appears by the record or by such evidence as under the practice of the court where the judgment is entered is competent it may be vacated on motion at any time. Though process was served in some manner or was defective in form and the judgment is not therefore absolutely void, it will generally be vacated on motion. While it is universally conceded that a judgment void for want of jurisdiction over the person of the defendant may be vacated on motion, irrespective of the lapse of time, there is a wide diversion of opinion as to what judgments are void for this reason and as to whether the motion to vacate a judgment is a direct attack upon it so as to warrant the reception of evidence not found in the record, and perhaps inconsistent with that which is to be found there.”

1 Freeman on Judgments, 4th Ed. pp. 97-98.
 Cases cited: People vs. Green, 74 Cal. 103.
 People vs. Mullan, 65 Cal. 396.
 Ladd vs. Mason, 10 Ore. 308.
 People vs. Pearson, 76 Cal. 403.
 Ex Parte Krenshaw, 15 Peters 119.

“If complainant stockholders sue for the restoration of assets of the corporation which have been diverted by its unfaithful directors into their own hands or into the hands of stockholders or strangers in breach of their duty or trust, neither those assets nor any proportion of them can be restored to the complaining stockholders, but recovery must be had in behalf of the corporation, and a receiver will in a proper place be appointed to take charge of and administer them.

Thompson on Corporations, pp. 4560-4490 and 4491.

Thompson vs. Stanley, 20 N. Y. Sup. 317.

“It will frequently happen that a majority of the shareholders are in a fraudulent conspiracy against the rights of the minority. The minority or one of the minority suing for himself and others in like situation with him may file the bill. Where the bill is thus filed it is not necessary that the share holders should be made party by name, nor is it an objection that some of the share holders have become adversely interested.”

Thompson on Corporations, pp. 4566.

“Where the action is brought to undo frauds already committed and to restore to

the corporation assets wasted, the action does not proceed in right of the stockholders but it proceeds in right of the corporation, and consequently whatever is restored accrues to the corporation, and the law at once attaches to it the character of a trust fund for the creditors of the corporation first, and for its stockholders next, in which all are to share ratably and in respect of which no one gets a preference over the other, not even the stockholder who takes upon himself the burden of prosecuting the suit which results in its restoration.”

Thompson on Corporations, pp. 4491.

Slattery v. St. Louis & T. Co., 94 Mo. 217,
4 S. W. 79.

COUNSEL FEES.

We had insisted that this suit is a stockholders' suit brought in a representative capacity by the original complainant for himself and stockholders similarly situated, being stockholders of the Mutual Loan Association and as such entitled to all of the rights, privileges and property as a stockholder in defendant Loan Association, including the right of complainant and intervenors to participate in all of the assets of defendant Loan Association and upon the distribution thereof to receive such, if any, property as may remain undisturbed as the property of defendant Loan Association after defendant Loan Association had discharged all of its obligations to its stockholders in paying off and discharging such stock therein as may have matured and become due and payable from said de-

fendant Loan Association to the members entitled thereto. That complainant recognized the necessity of suing in such capacity and for such purposes is evidenced by the contents of Paragraph IV of his petition, folio 73. Transcript No. 2417. /

In this capacity and seeking this relief the rule is well established that a stockholder being successful in the litigation should be allowed counsel fees out of the fund recovered; that is to say, all the stockholders of the corporation receiving the benefits of the litigation should share in the payment of the expenses incident thereto.

It was doubtless upon this theory and under this rule that the expenses of the litigation were sought to be allowed in the decree of February 27th, 1913. Nor can we believe it was ever the intention of the learned Judge presiding in the Court below on this date that counsel fees were to be paid out of the common fund belonging to all stockholders without requiring the original complainant and intervening stockholders to pro rate in such payment. That this has been done is evident from the terms of the decree of February 27th, 1913, allowing to each intervening stockholder the amounts alleged by each intervenor to have been the total amount paid on account of the purchase price of stock.

If this is a stockholders' suit brought for the benefit of all stockholders, this expense should be paid out of the stockholders' common fund, thus reducing the share of each stockholder in the distribution of the remaining fund by an amount proportioned to the amount he has paid in. If this suit is a suit brought by individual

stockholders, having an individual right accruing to them as distinguished from stockholders not named as intervenors, it seems too clear for argument that an amount should have been set aside from the fund aggregating the total amount paid in by all intervening stockholders, out of which fund recovered for their individual benefit they should be compelled to pay the expenses of litigation. Any other method would be equivalent to a personal action by the intervenors and the judgment against such non-intervening stockholders to be paid by them not only in the full amount, but including counsel fees (presumably due on account of individual contracts) as well as the ordinary expense of litigation, and this without reference to the rights of holders of matured stock, which matured stock as noted by reference to the bill of complaint above referred to is by Clark himself recognized as having a priority of lien upon the fund recovered and for which Clark sets up no claim. Folio 73-74.

We do not wish to be understood as contesting the amount of the decree of February 27th, 1913, allowed to the able and distinguished counsel who up to this date had participated in this litigation, save upon the ground that such compensation should not and cannot be allowed except upon the theory that if allowed out of the common fund belonging to the corporation, stockholders of the corporation in whose name and for whose benefit the decree was rendered should not be compelled to participate in the payment of this compensation and be denied the benefits of the decree. We assert that there is a complete unanimity of authority that costs payable

by the complaining stockholders are payable by them per capita and not pro rata, according to the amount of stock held by each.

Edwards vs. Bay State, etc., 130 Fed. 242.

It is stated in Cook on Corporations, 6th Ed., to be the rule that

“Inasmuch as the suit is for the benefit of all of the stockholders, and inasmuch as the results of the suit belong and go to the corporation, it is right that the expenses of counsel fees and other disbursements of the suit should be paid by the corporation, provided the suit so instituted is successful. The proceeds of a stockholders’ suit belong to the corporation, less a reasonable allowance for the plaintiff for his costs, disbursements and attorneys’ fees.”

Cook on Corporations, 6th Ed., Paragraph 879, page 3160-61.

Citing Fox v. Ehle, 108 Cal. 475.

Meeker v. Winthrop Iron Co., 17 Fed. 48.

Trustees v. Green, 105 U. S. 527.

Central R. R. Co. v. Pettus, 113 U. S. 116.

Forrester v. Boston Co., etc., 74 Pac. 1088.

4 Thompson on Corporations, Para. 4491.

In view of the fact that the decree of February 27th, 1913, allowed to counsel for the petitioner a fee to be paid out of the stockholders’ common fund, thus recognizing the suit was brought for all of the stockholders, and not for those of a class, we deem the following quotation

from the opinion in *Lamar vs. Hall*, 129 Fed. 79-83, to be particularly applicable to the facts of the case at bar, as follows:

“It may be stated as a general and unquestioned principle that each client should compensate his own solicitor and that an attorney cannot make another person his debtor by voluntarily rendering services in his behalf without his express or implied consent. The cases which allow compensation to attorneys out of a trust fund are not in conflict with this principle, but are founded upon it, for they depend upon the principle of agency, the actual plaintiff being the representative of the beneficiary of the trust * * * only jointly interested with others in trust property who in good faith maintains for himself and others interested like him, the necessary litigation to save it from waste and to secure its proper application is entitled to the reimbursement of his interest *as between solicitor and client out of the fund to be administered.*”

The fund to be administered in the case at bar is as we have before stated, either first the fund set aside in a sufficient amount to reimburse intervenors to the full extent of the amount by them paid in upon their stock subscription, or second, it is the common fund in which all stockholders, whether participating or non-participating, guilty or innocent of the acts complained of, are interested to the same extent as is the petitioner who sued in a representative capacity.

By this decision the Court was without juris-

diction, except upon the theory that this was a stockholders' suit brought for the benefit of all stockholders of the Loan Association, to allow counsel fees out of the general fund in fulfillment of an implied or expressed contract made by intervening stockholders to pay counsel out of the fund which might be recovered for their personal benefit.

In further support of our contention that the Court was without jurisdiction to enter the decree of February 27th, 1913, we refer to the case of *Sullivan v. Stukeley*, 86 Fed. 491; *Lewis v. Clark*, 129 Fed. 570, and *Toll v. American, etc., Society*, 61 Fed. 446.

Before quoting further from these cases, it is to be noted that in the admission that the Loan Association was on the date of the attempted transfer of its assets, insolvent; we at this time again request the Court to consider the anomalous position occupied by a stockholder who claims the right under a decree not only to have expenses and counsel fees of his private litigation paid by other stockholders in the Loan Association, but, without regard to the rights of stockholders whose stock has matured and who have thus become creditors instead of stockholders (as admitted by Clark, the original petitioner), and other creditors, if any there might be, and with regard to the possible contingency of some of the intervenors having been borrowers from the stockholders' fund, to be paid the full amount of his investment in an admittedly insolvent corporation.

Returning to the cases cited, the case of *Sullivan v. Stukeley* supra is a direct contradiction of this asserted right in that it holds that under

any of the three contentions made in behalf of the rights of stockholders of an insolvent building and loan association all stockholders are on an equality. *Lewis v. Clark supra*, while sustaining the statement that the insolvency of a Loan Association terminated the contract between it and its members, also contains the statement quoted from page 573 that

“The share holders in associations of this character are not in the ordinary sense creditors, and if deemed creditors in any sense they are necessarily subject to all equities existing between themselves.”

The case of *Toll v. American, etc., Society, supra*, in a concise and full opinion rendered by Judge Grosscup involving the direction of that Court regarding terms on which the borrowers of the association might repay their loans and also the claims which the Receiver should advance on like actions in case of compulsory foreclosure contains the following language:

“The first question is whether he (the stockholder) is entitled to a credit for the amount of the assessments paid upon his stock. I think not. Such a credit practically would be paying par on his stock and a *preference over other stockholders to which clearly he is not entitled.*”

As a matter of fact, while the original suit was by a perfect bill of complaint commenced by Clark, the original complainant, suing as a stockholder for the benefit of all stockholders of the

Loan Association who were injured by the void, fraudulent and attempted transfer by the Association to the Trust Company of its assets, each intervening petition, word by word and step by step departed from the result originally sought to be obtained, until by the so-called final decree of February 27th, 1913, the proceeding was transformed from a suit brought by the Corporation for the benefit of its stockholders, to a suit brought by stockholders as creditors for the redress of a private wrong and the enforcement of a private right claimed to be not common to other stockholders.

So far as it may be determined from the pleadings and from the decree of February 27th, 1913, the only justification for this departure is based upon the claim that because those stockholders not named as intervenors did not permit their names to be used, they should for this reason be deprived of their status as plaintiffs and of their right to share in the benefits obtained by the decree. Not only is this true but they are burdened with the payment of several thousands of dollars expended in the employment of eminent counsel and unnecessarily expensive litigation for the individual benefit of those who at the most were merely formal parties to the suit.

The intervenors in this suit adopted all of the averments of the original bill of complaint. The intervening petitions were unnecessary except to confer upon the intervenors the right to assist in the control of the litigation. Especially is this true in the case at bar where the intervenors by adopting the allegations of the bill of complaint filed by Clark align themselves as plaintiffs in the action.

The office and the rights of an intervenor in support of a proceeding in equity are well stated in the case of *Brickerhoff v. Bostwick*, 1 N. E. Rep. 667. This was an action commenced by plaintiff as a stockholder suing in his own behalf and for the benefit of other stockholders of a national bank in which other parties intervened. While this case is cited by us for the purpose of defining the rights of intervenors it is also applicable to the claim made by petitioner that all stockholders of the Loan Association not intervening are barred by laches from claiming the right to participate in the decree, in that the case holds that the action being brought in a representative capacity, all stockholders as well as the nominal plaintiff were before the Court, and unless the action of the original plaintiff was barred by laches, the action on the part of those stockholders similarly situated would not be barred.

The case of *Brickerhoff v. Bostwick*, 1 N. E. 667, contains the following language:

“The action was commenced by Theodore Brickerhoff, suing on his own behalf and for the benefit of the other stockholders of the bank; and therefore, for the purpose of the statute of limitations, the action must be treated as if all the stockholders were plaintiffs. The action is really the action of all the stockholders, as it was necessarily commenced in their behalf and for their benefit. It could not have been commenced by one stockholder for himself alone. It is true that at any time before judgment the original plaintiff, before the others were made par-

ties, could have discontinued the suit, or could have settled his individual damages with the defendants, and have executed a release which would have been effectual as to him. But if he had prosecuted the action to judgment, then the judgment would have been for the benefit of all the stockholders, and he would then have ceased to have control over it, because the rights of the other stockholders would at once have attached thereto. The bringing of the action by this original plaintiff did not prevent the other stockholders from bringing similar actions; but the moment a judgment should be recovered in one action for the benefit of all the stockholders, the proceedings in all the others would be stayed. *Innes v. Lansing*, 7 Paige, 583. In this case, therefore, it was not necessary that the other plaintiffs should have been joined as nominal plaintiffs. The suit could have gone to judgment without their presence as nominal plaintiffs, but the judgment would have been just as effectual and just as beneficial for them as if they had been actually named as parties plaintiff. The suit having been commenced for their benefit, in which full and adequate relief could have been given to them, their rights would not have been barred by any lapse of time if they had not come in as plaintiffs. There was no purpose in their becoming nominal plaintiffs, except that they might have some control of the action, and thus be present to protect and secure their rights, and to prevent a discontinuance of the action by the original plaintiff."

JURISDICTION OF THE COURT TO ENTER
DECREE OF FEBRUARY 27.

“It is a general rule, well established that after a term has ended, all final judgments and decrees of the Court pass beyond its control unless steps be taken during that term by motion, or otherwise, to set aside, modify or correct them; and if errors exist they can only be corrected by such proceedings by a writ of error or appeal as may be allowed in a court which by law can review the decision. So strongly has this principle been upheld by this Court that while realizing there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered, and this is placed upon the ground that the case has passed beyond the control of the court.” *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797.

To this general rule there are well recognized exceptions to the effect that while the general rule is applicable to cases at law a judgment or decree which under the general rule has become final by the expiration of the term, may be modified after the term and purged of errors or reversed by proceedings for error in fact. The exception to the rule is stated by Mr. Justice Curtis in the case of *Hendrickson v. Henckley*, 17 How. 443, 15 L. Ed. 123, as follows:

“A court of equity does not interfere with judgments at law unless the complainant has

an equitable defense of which he could not avail himself at law because it did not amount to a legal defense at law which he was prevented of availing himself of by fraud or accident unmixed by negligence of himself or his agents."

Upon the question of the jurisdiction of the Court to enter the decree of February 27th, 1913, the position taken by respondent is as follows:

A Court only acquires jurisdiction according to the established modes covering the class of case to which it belongs, and an erroneous judgment can be attacked collaterally. One not a party to a judgment cannot appeal therefrom and it follows that such a one is not bound by the judgment because of the fact that he is not a party. Where one is sought to be bound by a judgment it must appear that he is a party, and if by the terms of a judgment it is sought to bind him by it he is a necessary party and as such should be brought into Court in order that he may have his day and have his rights litigated. Bare notice or actual knowledge of the pending litigation is insufficient, for where a party is necessary to the adjudication of a cause he must be brought into court by a process of the court. Under the decree in this case the judgment being for the personal benefit of the intervening stockholders and against the interests of those stockholders not intervening, we submit that such non-intervening stockholders were necessary parties not brought before the court by process or at least so far as they are concerned, the decree of February 27th cannot be consid-

ered a final decree because it could not be adjudicating their rights for the purpose of rendering a final judgment against them without their presence in court; as to such non-intervening stockholders the decree of February 27th, 1913, is interlocutory; the proceeding in this cause being equitable and the court having taken possession of the property for the purpose of conserving the interest of the petitioners and those similarly situated, an order made by the court which does not so conserve the interest of all stockholders is made without jurisdiction. The petition is based upon equitable rights, the relief sought is equitable, the judgment of the court does not follow equity by preferring a portion of the stockholders of the same class as against the remainder. The judgment is in law rather than in equity and is therefore entered without jurisdiction.

“A court has no power to render judgment respecting a matter not submitted to it for decision though such judgment is pronounced in an action involving other matters which have been submitted to it for decision and over which it has jurisdiction.” Freeman on Judgments, 4 Ed. para. 120, page 185.

In an opinion by Mr. Justice Brewer the rule is stated to be that:

“A judgment for the recovery of the possession of real estate rendered in an action whose pleadings disclose only a claim for the possession of personal property cannot be sustained, although personal service was made upon the defendants.”

Reynolds vs. Stockton, 140 U. S. 254, 35 L. Ed. 464.

By the same reasoning the Court was without jurisdiction to render the decree of February 27th, because of the fact that the suit was brought by Clark in a representative capacity for all stockholders similarly situated; that is to say, for all stockholders whose rights under the contract with the Loan Association had been impaired by the void, attempted transfer of the assets of the Loan Association to the Trust Company, and the decree purports to adjudicate the rights of petitioners and intervenors in their capacity as individuals, taking away from the corporation itself and stockholders similarly situated with the intervenors the benefits of the judgment.

The case of Reynolds v. Stockton *supra* involved the jurisdiction of the Court in a stockholders' suit brought for the purpose of securing the reconveyance of personal property from one corporation to the complaining corporation, to enter a judgment so affecting the issues presented by the petition as to adjudge also the return of all real property. It was held in this case that the Court had no jurisdiction to enter a judgment affecting the real property because such an adjudication was not within the issues of the suit and

“the rule is universal that where defendant appears and responds only to the complaint as filed and no amendment is made thereto the judgment is conclusive only so far as it determines matters which by the pleadings

are put in issue.” * * * * “The inquiry is, had the Court jurisdiction in the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment.”

In this case the language of Mr. Justice Campbell in *Washington Hackett Co. v. Sickles*, 65 U. S. 333, 16 L. Ed. 650-53, is quoted with approval as follows:

“The essential conditions upon which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand and of the parties in the character in which they are litigants.”

Applying this rule to the case at bar we submit that the decree of February 27th, cannot

bind the non-intervenors because of the fact that while there was an identity of the demand and of the parties in the character in which they were litigants as set forth in the petition of Clark there was no such identity of demand or of the parties litigant set forth either in the petition of the intervenors or in the judgment rendered for their especial and individual benefit.

To the same effect the rule is even more vigorously stated in *U. S. v. Walker*, 109 U. S. 267, 27 L. Ed. 927, as follows:

“Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void.”

Citing with approval the language in the well known case of *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914, in which Mr. Justice Field after a review of the cases bearing upon this subject announced the decision of the Court as follows:

“The doctrine invoked by counsel that when a Court has once acquired jurisdiction it has a right to decide every question which arises in the case and its judgment, however erroneous, cannot be collaterally assailed is undoubtedly correct as a general proposition but is subject to many qualifications in its application. It is only correct when the Court proceeds after acquiring jurisdiction of the cause according to the established modes covering the class to which the case belongs and does not transcend in the extent

or character of its judgment the law which is applicable to it.

“To a bill for the dissolution of a corporation and an accounting filed for the benefit of a single stockholder not on behalf of the rest, the other stockholders or their representatives must be made defendants.”

Fosters Federal Practice, 4th Ed., p. 342.

Citing *Watson v. U. S. Sugar Refining Co.*,
68 Fed. 769.

The case at bar among other things is an action for an accounting. The decree of February 27th directs an accounting. The original bill of complaint prayed for an accounting between the Loan Association, the Trust Company and stockholders of the Loan Association similarly situated with the complainant. In so far as the decree purports to direct an accounting for the benefit of all stockholders it is within the rule laid down in Fosters Federal Practice, *supra*. In so far as the decree purports to direct an accounting only as between the intervening stockholders and not on behalf of the rest, other stockholders or their representatives, under the above rule, must have been made defendants. This not being done the other stockholders affected by the decree have not had their day in court.

[To the effect that a cause of action where the relief sought is personal as distinguished from general relief sought on behalf of all stockholders is a misjoinder to such an extent as will not permit a judgment in favor of the complaining stockholder not participated in by the other stockholders citation is made to *Metcalfe v. Amer-*

ican School Furniture Co., 108 Fed. 909. In this case a minority stockholder in the corporation sued in behalf of herself and other stockholders similarly situated to set aside an alleged transfer of property of the corporation in pursuance of conspiracy between its officers and the transferee where it is alleged the corporation on demand has refused to bring suit and also seeks the recovery of treble damages under the anti-trust act. It is declared to be multifarious, since such damages are only recoverable in an action at law by the plaintiff as an individual and not as a stockholder, while the relief prayed for is in behalf of the corporation and if granted would inure to the benefit of all the stockholders.

“In the absence of fraud or collusion an intervening defendant can ordinarily set up no defense of which the original defendant could not have availed himself, nor can an intervening complainant contest the general object of the suit.”

Fosters Federal Practice, 4th Ed., p. 673.
Citing *Forbes v. L. P. and Pacific Railroad*,
2 Woods, C. C. A. 323.

ALL STOCKHOLDERS OF ARIZONA MUTUAL BELONG TO SAME “CLASS.”

“Upon general principles if the party named as plaintiff who sues in behalf of himself and others fails in his suits, those whom he represents must also fail, for the rights of those represented can rise no higher than

those named as plaintiffs.” *Quinlin v. Meyers*, 29 Ohio St. 500-10.

Conversely it must be true that the rights of intervenors are dependent upon the relief prayed for in the original suit, professedly in this case being brought for Clark and all other stockholders similarly situated; the intervenors would be entitled to no other relief or to any higher relief than might have been granted had the suit been prosecuted in the name of Clark as nominal plaintiff on behalf of and for the benefit of stockholders in the Loan Association similarly situated. By the phrase “similarly situated” is meant not those stockholders who are the nominal parties to the suit but all stockholders who at the time of the commencement of the suit were similarly situated in their contractual relations with the Mutual Company as was Clark. If in this case the directors of the Loan Association, fraudulently and collusively combining with the directors of the Trust Company entered into a contract and agreement which from its inception was void as being a breach of the trust relation imposed upon them by virtue of their offices as directors, the entire transaction as is alleged in the bill became void, not only as to Clark but as to all who were stockholders in the Loan Association at the time of the alleged, attempted fraudulent transfer. From this point of view there could be no such thing as “assenting” or “non-assenting” stockholders because of the legal impossibility of an assent by either class of stockholders to an act void in law. Indeed we believe it may be stated as a rule which will not be denied by petitioner that his stand-

ing in this court of equity rests upon the statement contained in the pleadings that the suit is brought in a representative capacity for the benefit of the corporation and its stockholders.

Upon the authority of a statement made by counsel for intervenors in one of the briefs submitted during this litigation filed October 16th, 1912, marked for identification in the office of the Clerk of the U. S. District Court, file "No. 53."

"the admitted facts show that the acquisition of the assets of the Loan Association by the Trust Company was and is illegal. This in effect has been twice judicially decided in this cause, once by Judge Morrow and once by Judge Sloan."

This statement by counsel for petitioners is sustained by the decree of February 27th, in which it is found that the entire transaction between the directors of the Loan Association and the directors of the Trust Company was fraudulent and void. The petition of Clark upon its face is a disclaimer of any voluntary participation of any stockholder of the alleged fraudulent acts. There is no claim that the acts alleged to be fraudulent were voidable. On the contrary, the distinct allegation is that the transfer of the stock of all Loan Association stockholders was beyond the power of the Loan Association to effect under the contract between the stockholders and the Loan Association. That such attempted transfer was in breach of the trust relations which the directors of the Loan Association bore to its stockholders and was accomplished by such fraudulent misrepresentations as to render the transfer void ab initio.

The true test as to whether a suit should be brought by a stockholder in his individual right or in a representative capacity is said to be as follows:

“Is the complainant affected only as every other shareholder is affected, or is he affected in some manner peculiar to himself.”

Machen on Corporations, para. 1152.

Converse v. United Shoe Co., 185 Mass. 422;
70 N. E. 444.

Miles v. N. Y., etc., Ry. Co., 176 N. Y. 119;
68 N. E. 142.

Lawrence v. Curtis, 191 Mass. 240.

Wells v. Dane, 101 Maine 67; 63 Atl. 3242.

Bigelow v. Calumet Mining Co., 155 Fed. 869.

In the case at bar under the facts pleaded, the interest of all stockholders of the Loan Association are affected equally. Any transfer of any portion of the assets of the Loan Association lessening the value of the stock of one stockholder must have a like effect upon the stock of every other stockholder and this whether the holder of stock assented or refused his assent to such transfer. Any misappropriation of the funds of the Loan Association by its officers had an equal effect upon the value of all stock. Every act of mismanagement entailing an unwarranted expenditure of money affected the rights of all stockholders and the value of all stock and in no manner are the intervenors affected except as every other shareholder is affected, unless indeed as results from the decree of February 27th, 1913, the shares of the intervening stockholders are unwarrantably and unduly en-

hanced in value by a distribution of all of the assets in the corporate fund to the intervenors and to the exclusion of the other share holders.

[The original action commenced by Clark is predicated upon the assumption that the attempted transfer of assets from the Loan Association to the Trust Company was void ab initio and deprived him and other stockholders of the Loan Association without respect to the class of stock held by them, of their rights as stockholders in the Association.

The intervening petitions attempt to place petitioners in a class by themselves resting only upon the fact either that they never exchanged their stock for stock of the Trust Company, or that having exchanged they had rescinded their action. The intervenors pray for and are granted relief in an action accruing to themselves personally, arising out of an action necessarily based upon the claim that the entire transaction was void. We submit that the cause of action attempted to be sued upon by the intervenors results in a joinder of a cause of action accruing to themselves personally with the cause of action brought by Clark on behalf of the Company and other stockholders against the same parties defendant. That this cannot be done and the Court was without jurisdiction to enter a decree in favor of the intervenors personally and against the corporation and non-intervening stockholders. That the authority to enter such a decree, the effect of which as we have before stated is a personal judgment in favor of some stockholders as against the other stockholders in a suit against the same defendant corporation, must rest upon the issuance of a valid process

giving to such non-intervening stockholders their day in court. That such a joinder of causes of action is multifarious and cannot be maintained in a Court of Equity. In support of this statement we cite:

Cook on Corporations, 6th Ed., para. 739,
pages 2462-2463.

Whiteney v. Fairbanks, 54 Fed. 985.

Farrow v. Holland Trust Co., 74 Hun. 585.

Metcalf v. American School Furniture Co.,
108 Fed. 909.

APPELLANT IS NOT A PROPER PARTY TO THE ORIGINAL CAUSE AND HAS NO RIGHT OF APPEAL FROM ANY ORDER OR DECREE MADE IN SAID CAUSE, EXCEPT THE RIGHT TO APPEAL FROM THE ORDER MADE MARCH 12, 1914, DENYING IT RIGHT TO INTERVENE AND DISMISSING ITS PETITION.

If the decree of February 27th, 1913, is sustained it will be admitted by appellee that the order denying the right of appellant to intervene is error. If on the other hand the decree of March 12, 1914, is sustained appellant is not only not injured by the decree, but its rights as a creditor of the Arizona Trust Company are fully protected. Under the decree of February 27th, after the setting aside of sufficient assets to pay in full claims of individual plaintiffs named as intervenors, stockholders not named as intervenors are compelled to retain their status as stockholders of the Arizona Trust Company, and all assets and funds in excess of an

amount necessary to pay the claims of intervenors is decreed to be the fund and assets of the Arizona Trust Company. The Farmers and Merchants' Bank as a judgment creditor will then, according to the prayer of its petition and by the sustaining of the decree of February 27th, be given a preferred creditors lien, to the exclusion of the claims of all other stockholders of the Mutual Savings and Loan Association, upon such funds as are decreed to remain in the hands of the Trust Company, and thus not only will the stockholders of the Loan Association be deprived of the relief to which they are entitled under the issues presented in the original Clark petition and intervening petitions, but the Farmers and Merchants' Bank will be paid out of the fund which under the decree of February 27th and the issues raised in the pleadings has been fraudulently, unlawfully, by the most criminal collusion of the Directors of the Loan Association and the Trust Company and by acts beyond the power of the directors of the Loan Association to effect, transferred from the control of the stockholders of the Loan Association to the Trust Company.

If on the other hand the decree of March 12th shall be sustained, the rights of the Farmers and Merchants' Bank are specifically and fully protected, in that claimants properly creditors of the Arizona Trust Company by reason of any dealings had with the Trust Company in respect to any funds which may properly remain in its hands after the defrauded stockholders of the Loan Association shall be satisfied, may present their claims to the master in chancery for allowance as claims against the Trust Company,

which claims may by the terms of this decree be paid out of any funds which may so properly remain in the Trust Company. (Record, pp. 92, 98.)

The claim made by appellant that it has been injured because of a denial to it of the opportunity to prosecute various persons named in its petition as liable to contribution to a fund to be collected by the receiver, is without weight when it is considered that under the decree of March 12th (Record p. 97) it is ordered

“That the standing master report on the priorities or equities of all persons claiming to be interested in the property of the Loan Association in the order which the same are to be paid out of the assets of said Loan Association.”

And

“It is further ordered that the master report what are the rights of said Loan Association in any assets now in the hands of persons not parties to this suit, and whether or not the same can be recovered from the parties to whom they were transferred.”

Although the statement about to be made is necessarily outside the record in this case, we deem it permissible and necessary to direct attention to the fact that prior to this appeal the master appointed under the decree of March 12th took active steps to perform the duties imposed upon him by this decree and that all activities were summarily stopped by this appeal for the very good reason that neither the Re-

ceiver nor the Master could properly hazard the chance of an order being made in this appellate proceeding denying his right under the terms of the decree of March 12th of incurring the considerable expense which would be necessary in the conduct of hearings which would become imperative in the fulfillment of duties imposed upon him by this decree.

As a matter of fact except for this appeal the Master and Receiver were proceeding in the performance of the very duties which by the prayer of the petition of intervenor and appellant he was required to perform. That is to say, he was assuming the right to collect the properties and assets of both defendant companies for the benefit of petitioner and of other judgment creditors of the defendant Trust Company and for the benefit of all those having claims of any kind or character against the defendant Trust Company. (Record p. 68.)

THE DECREE OF MARCH 12, 1914, IS APPEALABLE.

We are agreed with counsel for appellant that the decree of March 12, 1914, is appealable. Not because as is stated in appellant's Brief that the decree is a nullity, but because it is a final adjudication of the rights of all parties concerned *who were proper parties to the suit and whose rights and interests were affected by the decree.* Appellant is by the order made on March 12th granted an appeal from the order denying him leave to intervene (Record p. 100), although appellant is denied the right to appeal from the judgment because, as we have endeav-

ored to show, it was not a proper party to the original cause. With this statement we are prepared to admit contentions of appellant contained in its Brief, pages 10, 11, 12, 13, 14 and 15. But we do deny that plaintiff has been injured within the scope and purview of the case of Credits Commutation Co. vs. United States, 91 Fed. 573, 177 U. S. 315-316, and other cases cited on page 18 of its Brief. Neither do we agree with counsel in his statement contained on page 18 that

“It has uniformly been the practice in the Federal Courts to file creditors’ bills and bills of the nature thereof as a matter of right without leave of the court.”

If this is a creditors bill it should, under the decree of February 27th, and especially under the decree of March 12th, be submitted to the master. If the master refuses without just ground to bring the actions suggested to be brought as in appellants bill for intervention set forth, appellant has ample recourse for the protection of its rights by noticing to the Court this dereliction of duty on the part of the receiver and master.

This is a bill in intervention founded upon the assumption that rights of appellant had by the decree of February 27th become vested rights. The allowance or disallowance of a bill in intervention is stated to be discretionary with the Court and an order denying leave to intervene is not regarded as a final determination of the merits on which the intervention is based, but leaves the petitioner at full liberty to assert his

rights in any other appropriate form of proceedings.

Credits Commutation Co. v. United States,
supra.

The determination of the question as to whether or not appellant is injured by denial of leave to intervene depends primarily upon whether or not it shall be permitted to assert such right under the decree of February 27th. In Credits oCmmutation Company, supra, the rule is stated as follows:

“Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it can not be refused because it merely involves an exercise of the discretionary powers of trial courts. It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right *which will be lost in the event that he is not allowed to intervene before the fund is dissipated*. In such cases an order denying leave to intervene is not discretionary with the Chancellor and will generally furnish the basis for an appeal since it finally disposes of the intervenor’s claim by denying him all right to relief.”

We submit and close this Brief with the

statement that if the Court had jurisdiction to enter the decree of February 27th, 1913, appellant had a vested right to the extent of his claim against all funds remaining in the Trust Company in excess of the amount necessary to pay intervening stockholders named in the decree of February 27th.

If that decree was entered without jurisdiction, the rights of appellant are fully protected under the decree of March 12th, in that not only are the funds in court undergoing administration to which appellant asserts a right not lost, but on the contrary, will be conserved for the benefit of the appellant and other creditors of the Trust Company to the extent of any fund that may remain properly belonging to the Trust Company. If the funds collected by the receiver are under the authorities referred to in this Brief properly the funds of the defrauded stockholders of the Arizona Mutual, it is apparent that appellant, being a creditor only of the Arizona Trust, and asserting no claim as against the funds of the Arizona Mutual, is not entitled to payment out of the funds belonging to the Mutual.

Respectfully submitted,

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